

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

C2G LTD. CO.,

Respondent Employer,

and

**GENERAL TEAMSTERS LOCAL 959,
STATE OF ALASKA, AFFILIATED
WITH THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS,**

Charging Party Union,

Cases 19-CA-163444
19-CA-169910

**BRIEF IN SUPPORT OF RESPONDENT'S EXCEPTIONS TO
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respectfully submitted,

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I. INTRODUCTION

This matter arises out of a collective bargaining relationship between C2G Ltd. Co. (“Employer” or “C2G”), a small disabled-veteran owned business, and General Teamsters Local 959 (“Union” or “Teamsters”), concerning employees represented by the Union who provide services called for under Employer’s government contract at Eielson Air Force Base in Alaska. Bd. Tr. 5:18-46:14.¹

Before the Board are exceptions to the Administrative Law Judge’s ruling on an amended complaint filed by Counsel for the General Counsel (“GC”) on March 8, 2018.

At the specific election of the GC, this case did not proceed to a hearing until after there had been two separate arbitrations (consisting of collectively of four days of testimony), concerning the right to hire part-time employees, and what the contract provided for vacation accrual. (GC-1 dated September 9, 2016), and then sought for and obtained a ruling and remedy in this proceeding that is directly contrary to the Arbitration awards and the arbitrator’s interpretation of the CBA. Arbitrator Richard Ahearn heard extensive evidence (JX-2 and 3) concerning how the CBA, and prior contracts between the Union and previous contractors, had been interpreted and applied with respect to vacation accrual, and testimony from multiple bargaining unit members concerning vacation accrual, and concluded that vacation did not accrue during the first year of employment for employees who were not “part-time seasonal” employees. (JX-4.) Nevertheless, GC sought, and the ALJ agreed, that the clear language of the CBA should not be followed because during a limited period four employees had mistakenly received pay stubs showing they were accruing vacation during the first year of employment.

¹ References to the hearing held on April 24, 2018 will be “Bd. Tr. _.” “JX- _” references are to the joint exhibits making up the stipulated record. References to “GC-1” means the GC Exhibit.

Arbitrator Marshall Snider heard much of the same evidence as was presented to Arbitrator Ahearn (JX-5 and 6) , and concluded that C2G did not violate the CBA by employing individuals as part-time employees, or by directly dealing with employees by sending them an offer letter. (JX-7). Yet, GC sought, and the ALJ ruled, that C2G violated the Act by engaging in direct dealing with the new hires and job bidders, and must destroy all offer letters that contained language deemed objectionable.

Thus, GC allowed this dispute to be ruled upon by two different arbitrators, and then proceeded to seek the exact opposite remedies when it did not like the rulings. Thus, without any ability to evaluate the credibility of the Union's witnesses, the ALJ relied on the transcript of testimony in the arbitrations to determine how the Union employees could have been intimidated by the offer letters or their application, or misled into believing they were entitled to accrue vacation in the first year of their employment, despite the clear and unambiguous language of the CBA. The ALJ's decision, and remedies, concerning the alleged Section 8(a)(1) and 8(a)(5) allegations should be denied as inconsistent with those arbitration awards, inconsistent with the substantial evidence, and barred by the applicable limitations period. The following discussion explains in detail why the ALJ's rulings against C2G should be reversed.²

II. ISSUES

1. Whether the ALJ erred in concluding that "General Counsel has met her burden to prove Respondent violated Section 8(a)(5) and (1) by unilaterally recalculating the employees' vacation accrual, and then by recalculating the employee's vacation at a different rate," including by finding there existed a long-standing past practice of three years during which employees

² C2G does not except from, or appeal from, that portion of the ALJ's Order finding that C2G did not violate Section 8 (a)(3) as alleged.

accrued vacation during the first year of employment ? (Exceptions 1, 3, 5, 6, 7-10, 16 and 17). See Part IV, A and E below.

2. Whether the ALJ erred in not deferring to the contract interpretation set out in Arbitrator Ahearn's Award and by conducting her own analysis of the CBA? (Exceptions 11-15, 18-22). See Part IV, A.6.-7. and E below.

3. Whether the ALJ erred in concluding that the allegations in the Amended Complaint concerning the offer letters were not time barred? (Exceptions 23-25). See Part IV, C below.

4. Whether the ALJ erred in concluding the offer letters violated Section 8(a)(1) of the Act? (Exceptions 2, 26-31). See Part IV, B below.

5. Whether the ALJ erred in finding that C2G had engaged in direct dealing? (Exceptions 4-5, 27-28, 30-31). See Part IV, D below.

6. Whether the ALJ erred in her remedy by ordering the destruction of all offer letters? (Exceptions 6, 32). See Part IV, F below.

7. Whether the ALJ erred in her remedy by ordering that all employees receive the Section 18.02 accrual rate during the first year of hire, regardless of when hired in the future? (Exceptions 6, 33). See Part IV, F below.

8. Whether the ALJ erred in her remedy by effectively precluding the Employer from exercising its right in the future to hire part-time seasonal employees? (Exceptions 6, 33). See Part IV, F below.

III. FACTS

Key Background Information

Any review of the factual context for the ALJ's decision requires a brief understanding of the principal parties and witnesses:

1. **C2G.** C2G is the employer who has a contract with the Air Force's Air Mobility Command to provide services at the Eielson Air Force Base near Fairbanks Alaska. (Bd. Tr. 45:18-21). C2G was awarded this contract in 2012, starting October 1, 2012. (Bd. Tr. 64:7-13). The prior contractor on site was **CAV International**, which also had a contract with the Union. C2G is not affiliated with CAV, and had no involvement in negotiations over any prior contract with a former government contractor. (Bd. Tr. 62:18-63:24). Some of the Union employees who worked for C2G previously worked for CAV and/or Trail Boss, including Union Steward, **Ken Johnson**. (Bd. Tr. 70:15-20).

2. **Tom Copeland** is the owner and President of C2G, and a disabled veteran with 22-plus years of service in the Air Force. (Bd. Tr. 45:3-9; Tr. 61:3-21).

3. **Carol Huggins** is and was the bookkeeper for C2G. She is one of four employees who work at C2G's main office in South Carolina. Huggins does not have a college degree. She was not a CFO. She did not supervise any employees. She gave herself the title she had. She is not a supervisor, nor did GC allege she was one. (Bd. Tr. 54:1-20), (JX-2, Tr. 349:16-350:2; JX 5, Tr. 356:16-357:6; 406-17-22).

4. **Jeremy Holan** is the Union's Business Agent who handled the C2G CBA for the Union. (JX-2, Tr. 149:2-44).

5. **Michael Smith** is a former Union employee of C2G who resigned and then filed a grievance (15-111) in August 2015 contesting the failure to pay vacation that he claimed was earned during the first year of his employment because his pay stub showed he had accrued the same, even though the CBA did not provide for such accrual and the accrual on the pay stub was due to an error. This grievance was subsequently withdrawn. (Bd. Tr. 72:22-74:1).

The Employer's Business Operations

C2G contracts with the Air Force's Air Mobility Command to provide air terminal and ground handling services at Eielson Air Force Base in Fairbanks Alaska. (Bd. Tr. 45:18-21; Tr. 46:4- 48:7; JX-2, Tr. 350:17-23). This includes handling passenger traffic in and out of the Air Force base, and handling the inspection, loading and unloading of air cargo at the facility (including weapons, ammunition, and other military equipment and supplies). *Id.* (JX-5, Tr. 362:14-365:18).

C2G employed approximately 55 employees overall in 2015, approximately 10 of whom worked at Eielson Air Force Base. (Bd. Tr. 53:6-14). It has multiple other contracts with the federal government. (JX-5, Tr. 355:10-356:7).

When C2G was awarded the Eielson contract effective October 1, 2012, it hired a number of individuals employed by the former contractor to start work on the first day of the contract. Offer letters were issued prior to that date to individuals then employed by the prior contractor, CAV. Subsequently, the Union and C2G entered into a CBA on October 4, 2012 (JX-6, JX-1 thereto), three days after C2G started operations under the Eielson contract.

The CBA covers air cargo specialists, air terminal operations controller (ATOC), and customer service (gate agents). (Bd. Tr. 46:15-47:7). Air Cargo Specialists are the highest paid, and principally load and unload, and inspect, air cargo. (Bd. Tr. 47:8-23). ATOC employees manage air traffic coming into and out of the base and are guaranteed at least 36 hours work per week. (Bd. Tr. 47:24-48:7) The customer service employees handle passenger traffic. (Bd. Tr. 46:15-47:23). Bargaining unit employees who work on this contract are required to have a "secret" security clearance. (JX-6, Jt. Ex. 1 at App. A). As noted by C2G's President, Tom Copeland, the cost of obtaining a secret clearance through the Air Force to work on this contract

is expensive -- it can cost in the neighborhood of \$10,000 per individual. (JX-5, Tr. 380:14-15). Under Department of Defense regulations, a signed offer letter is required to commence application for a temporary, and a permanent, security clearance. (JX-6, Co. Ex. 5; JX-5, Tr. 389:5-8). The Employer was cited by DOD in 2016 for not having on file copies of all such signed offer letters. (JX-5, Tr. 384:18-385:11).

Due to difficulties in recruiting and retaining an adequate work force, C2G generally pays its staff 32 hours per week regardless of whether they are classified as full-time or part-time. C2G's President explained that it is difficult to identify, recruit and retain qualified employees with the necessary secret security clearance willing to work in Fairbanks. There is a limited pool of qualified workers in the immediate area. (JX-5, Tr. 380:22-381:16). Not only must the individual be qualified, but they must have a security clearance and have the Air Force approve that clearance. This takes time.

The Company, The Union, And The CBA

The Company won the bid for the Air Force contract in 2012, commencing October 1, 2012. (Bd. Tr. 64:7-10). Prior to commencing operations, and before entering into a collective bargaining agreement with the Union, on or about September 28, 2012, the Employer offered employment to the then current Air Cargo, ATOC and Customer Service Agents working on site for the prior employer. All the offer letters specified the position for which the individual was hired, and contained the following standard language:

All positions will be part time but do not preclude any or all employees from working 32-40 hours per week, or in excess of 40 hours per week depending on contract workload. The Company will in its discretion attempt to normalize work schedules within the constraints of a flexible and changing workload. *See* (JX-6, Union Ex.-C).

In connection with the Offer Letter, individuals signed a receipt for an Employee Handbook of C2G. (*See for example* JX-6, Union Exs. B-E). The offer letters specifically

referenced the Employee Handbook and stated “Your signature on the enclosed Employee Handbook will signify your acceptance of this job offer.” (*See, for example*, JX-3, Co. Exs. 26, 31). Significantly, the Handbook specifically stated that: “In the event employees are covered by a Collective Bargaining Agreement (CBA), those provisions contained in the CBA take precedence over this employee handbook.” (JX-6, Union Ex. K). The offer letter also contained language that “Except where otherwise stated or required by law, the terms and conditions of your employment will be set by C2G.... Any initial terms and conditions of employment not already mandated by law or the enclosed Employee Guidelines will be in accordance with C2G standard policies, procedures and/or practices. Of course, the Company reserves the right to the maximum extent permitted by law to alter or amend the terms and conditions of employment and its employment policies and procedures.” (*See for example* JX-3, Union Ex. 35).

Copeland admittedly copied this form of letter from one that had been used by CAV and made slight modifications. (Bd. Tr. 65:17-66:10). He subsequently continued to utilize a slightly modified version for all persons hired thereafter, including persons who accepted an offer into a new position. There is no evidence that the offer letter was intended or drafted so as to interfere with the CBA or employee rights thereunder. (Bd. Tr. 78:10-79:11).

Ken Johnson, who was serving as a Union steward for the prior employer (CAV), and continued as a Union steward after being hired by C2G received and signed such a letter, and informed the Union of this letter at or about the time of negotiations. (JX-5, Tr. 222:18-223:13,

JX-2, Tr. 319:18-320:13).³ The first round of offer letters in 2012 were sent out before there was a CBA and before C2G had hired its full complement of workers. (JX-5, Tr. 420:6-420:9).⁴

While in the process of hiring its full complement of employees, the Company engaged in negotiations with the Union over a new collective bargaining agreement. (JX-5, Tr. 419:17-420:12). As part of these negotiations, the Employer agreed (a fact that has not been contested by the Union) to grandfather the existing staff, credit them with service credit from the date they commenced working at the facility and treat them as full-time employees in their current positions, notwithstanding the prior offer letters. (JX-5, Tr. 426:7-427:13). This understanding superseded the prior offer letters. The Union has never disputed Copeland's testimony on this point, nor claimed the parties did not agree to treat them as full-time. In fact, language is included in Section 9.01 of the CBA, to include a specific reference to full-time regular employees having a certain amount of guaranteed hours of work per week.

Unlike the CAV contract, the CBA negotiated by C2G parties included provisions regarding work hours and employment of part-time seasonal employees and accrual of vacation and holiday pay for part-time seasonal employees. in exchange for adding certain benefits and large 4% and 5% increases in the final two years. (JX-5, Tr. 416:12-17; Bd. Tr. 64:14-20). As part of that new contract, the Union and C2G negotiated additional and different provisions

³ The Union had represented the bargaining unit employees of the prior employer under a contract that Copeland used as a starting point. (JX-6, Union Ex. I). The prior employer had utilized a similar offer letter for its bargaining unit employees to that used by C2G, including the part-time language quoted above. (See JX-6, Co. Ex. 12) even though the prior contract did not include separate language for accrual of vacation for part-time employees, or a separate accrual rate, like the C2G CBA.

⁴ Although the prior government contractor (CAV) hired everyone using offer letters that contained the same part-time language as that used by C2G, the prior contractor treated everyone the same for purposes of hours guaranty and vacation accrual. (JX-2, Tr. 366:17-366:22; JX-3, Union Ex. 25).

relating to part-time seasonal employees, including those relating to vacation accrual for part-time seasonal employees. (JX-6, JX-1 thereto). Section 18.01 of the CBA includes the following language:

Part time seasonal employees vacation will be paid out annually on their anniversary date and will accrue pro-rata based on the following:

- a. On date of hire, 0.038461 per hour.
- b. Beginning with an employee's fifth (5th) year of employment, 0.057692.
- c. Beginning with an employee's tenth (10th) year of employment 0.076923.
- d. Beginning with an employee's fifteenth (15th) year of employment, 0.0961538. (emphasis added).

Section 18.02 also discusses vacation:

Section 18.02 Vacation Amounts for Employees. Vacation benefits for bargaining unit employees on the active payroll of the Company are as follows:

- a. Eighty hours (80) after one (1) year of employment, accrued at 3.33 hours per pay period.
- b. One hundred twenty hours (120) beginning with an employee's fifth (5th) year of employment, accrued at 5.00 hours per pay period...

Vacation pay shall be considered at the employee's base hourly rate. Earned vacation hours as used in this Article shall vest as they accrue.

Because the newly-hired part-time employees could work far more than 32 hours, it is possible that an employee could earn more vacation under Section 18.01 than under the rate applicable to full-time employees under Section 18.02. (Bd. Tr. 67:12-18). That is because 18.02 vacation accrues at a flat rate regardless of the number of hours worked, whereas under Section 18.02, part-time seasonal employees accrue vacation based on the number of hours actually worked. Therefore, whether someone is accruing vacation at the 18.01 rate or the 18.02 rate is immaterial.

In the course of the Snider Arbitration, Union Business Agent Holan discussed the form of offer letter. Mr. Holan testified:

Q. Now, in the current grievance, joint two, which is 128, are you saying that you want the company to cease using offer letters?

A. The offer letters that they changed the interpretation of and September 2015, yes.

Q. So do you have a problem with the company's sending offer letters or just sending those offer letters?

A. Those offer letters, the at-will portion of it. The part-time/full-time status language violates our collective bargaining agreement and then the language that violates the company's own handbook, which is under the exception part of it. The employee handbook is actually states that the CBA supersedes the employee handbook, but yet the ...offer letter contradicts what the employee handbook states,

Q. Well, you are not disagreeing that the-under the parties' contract everybody agreed that the CBA would control-would supersede and the other terms, correct?

A. That is correct. The...CBA takes precedence over the employee handbook, and we believe the offer letters. (JX-5, Tr. 106:20-107:16).

Over time, the number of individuals employed under the CBA reduced by way of attrition. (JX-5, Tr. 438:3-20). Subsequently, starting in April 2014, as additional positions came open, new individuals were hired. C2G's first new hire was Michael Smith, who was hired and started work on April 16, 2014. Thereafter, C2G hired Allen Matthews starting November 10, 2014, Glenda Evans starting December 1, 2014, and Chris Jones starting May 1, 2015.

Each of these individuals was offered employment in a part-time position pursuant to an offer letter that contained the specific language quoted above other than the last sentence of the quoted language. All of the individuals signed the offer letter and accepted the position. After being hired, all of them were paid for at least 32 hours per week on a regular basis due to staffing needs.

In April 2014, the Employer also had an open part-time position for an ATOC Controller. (JX-6, Co. Ex. 17). The only way under the collective bargaining agreement to be hired into an open position is through the bid process provided for in Article VII of the contract. (JX-6, Jt. Ex. 1, Tr. 59:5-12). The bid procedure must be followed and there must actually be an open position. This is a less physically rigorous strenuous positions than the Air Cargo Specialist

position, but also carries a lower pay rate. Bd. Tr. 69:1-23. At that time, a current employee, Richard Tulietufuga, was scheduled for surgery due to a non-work related injury and had almost exhausted his paid time off. (Bd. Tr. 65: 3-21). Tulietufuga elected to bid for the open ATOC position. (JX-6, Co. Ex. 17). He was provided an offer letter for the position which specifically stated it was a part-time position. (JX-6, Union Ex. C). He signed the same form of offer letter that was presented to the other new hires and accepted and agreed to that position.⁵

The evidence is uncontroverted that at the time Tulietufuga received his offer letter, he informed Union Steward Ken Johnson about the part-time language in the letter, and Johnson in turn informed Business Agent Jeremy Holan. Union Steward Kenny Johnson told Holan that Johnson had received such a letter in 2012 as well. (JX-5, Tr. 222:18-223:13). In testimony, Johnson confirmed that at the time of the negotiations over the new contract in 2012, he had told the Union about the part-time offer letters. (JX-5, Tr. 222:18-223:13). And, Johnson and Business Agent Jeremy Holan, the Union confirmed they also knew in May 2014 that the Employer had been sending out offer letters of this nature. (JX-2, Tr. 252:19-255:11; 257:1-4).

Thus there is no question that in 2014, and as early as September 2012, the Union knew the Employer had been sending out offer letters of the type now objected to as direct dealing and

⁵ Tulietufuga claimed he approached the Site Manager, Jeff Carpenter, about the part-time language in the contract. JX-5, Tr. 243:5-22. According to Tulietufuga, Carpenter told him this was an ATOC position that was guaranteed 36 hours under the contract, and nothing would change. JX-5, Tr. 243:15-22. Carpenter no longer works for C2G, having resigned in July 2015. Bd. 80, Tr. 11:17. The Employer did not have an opportunity to call Carpenter as a witness because, as Copeland testified, both Carpenter and David Emig stopped working for C2G in 2015 in the August, September time frame and C2G had no idea in advance of the arbitration that Carpenter's actions would be raise da san issue. Copeland noted that Q. When you hear testimony here about people claiming that Mr. Carpenter said everything was going to be without change, what does that mean you? A. Well, I -- I can't speculate like -- because I'm not really sure, but to me, that means that our policy of continuing to pay them 32 hours, they were going to continue to get paid 32 hours, because that's what we do." (JX-5, Tr. 391:22-394:24).

unlawful. There is no evidence that the Union or the Union members ever considered that the offer letters took precedence over the CBA, created at-will employment, or gave the right to make changes to employment terms and conditions.

Nevertheless, the Union did not file a Board charge or a grievance in 2012. The Union did not file a Board charge or a grievance in 2014. No Board charge was filed until November 2015, more than a year later and only after the parties had proceeded to arbitration over vacation accrual and part-time status. (GC-1, Amended Complaint; Charge No. 19-CA-163444). Any right to object was waived.

Subsequently, within the next 90 days, Tulietufuga was medically cleared to return to work as an Air Cargo Specialist. When a position came open in Air Cargo in August 2014, Tulietufuga bid for that position. (JX-6, Co. Ex. 20). He then was provided with the same form of offer letter specifying this was a part-time position. (JX-6, Union Ex. C). Tulietufuga accepted and agreed to this offer and returned to work in Air Cargo. He never filed a grievance about this second offer letter.

In August 2015, a second open position was posted for an ATOC Controller. (JX-6, Co. Ex. 13). Another current Air Cargo Specialist, Phillip Finney, was scheduled for surgery for a non-work-related injury. He had exhausted his paid leave and could not physically work as an Air Cargo Specialist. Finney elected to bid for that open position. (JX-6, Co. Ex. 13, JX-6, Bd. Tr. 70:21-71:6). At that time he was provided an offer letter indicating this was a part-time position and containing the same basic language outlined above. (JX-7 at 11-12). Finney accepted and agreed to the offer and signed the offer letter. (JX-5, Union Ex. C. p. 11). He has continued as an ATOC Controller since bidding into that position.

The Mistake In How Accrual Rates For Vacation Were Shown On Employee Pay Stubs

In July 2015, Huggins discovered there had been a mistake in loading new post-2012 hires into the payroll system which had resulted in the payroll statements for those new hires showing them accruing vacation at the 18.02 rate from the date of hire even though the CBA provided that vacation for a new hire does not being to accrue until after the first year of employment. (JX-5, Tr. 406:17-22; 434:23-435:6; JX-3, Exhibit 11). She asked the Station Manager to advise the new hires of the mistake. Before this occurred, one of the new hires, Mike Smith, had resigned. Huggins corrected the mistake in Smith's final paycheck, and Smith questioned why his vacation hours had changed on his payroll statement. (JX-3, Exhibit 11).

Huggins responded in an email: "Yes, I was mistakenly accruing vacation before you were eligible. You were not eligible for accrual of vacation hours until you reached one year of employment. I apologize for the inconvenience." (*Id.*). In a follow-up email that same day, Huggins further elaborated on this issue. (*Id.*). She referred to Section 18.02 of the CBA and told Smith: "I had inadvertently been crediting you with leave from the date of hire by mistake." (*Id.*). Huggins explained that "I had not caught this previously because none of the new recent hires had tried to take leave yet. Chris Jones attempt [sic] to take leave and that is when it was noticed. While we wish it had never happened, the fact is there is no entitlement earned until after one year." (*Id.*). Huggins did not rely on any other offer letter.

Holan then called C2G's corporate office and spoke to Copeland, at which time Copeland checked with the bookkeeper, who told him Smith had been paid properly, and communicated that to Holan. (JX-2, Tr. 389:10-390:14 and additional cites at Exception 17). A grievance then was filed on behalf of Smith (#15-111) on or about August 15, 2015, seeking vacation pay for

the first year of employment for Mr. Smith. (JX-6, Union Ex. L).⁶ Shortly thereafter, within 10 days, the Union filed grievance 15-119 on August 25, 2015. Grievance 15-119 was filed as a class grievance (“Class Grievance”). It challenged the manner in which the Company was interpreting Section 18.02 of the contract (i.e. not crediting new hires as having earned vacation during the first year of the contract) and requested that C2G credit all members with vacation accrual during the first year of employment. (JX-6, Union Ex. N). Grievance 15-119 (“Class Grievance”) as filed was limited to whether the Employer violated the contract by not accruing vacation for an employee during the first year of employment. It was filed even though the Smith grievance raised a similar issue.

The Company’s Station Manager David Emig responded that pay and vacation matters are processed by the Accounting Manager, that he was not authorized to negotiate contract changes, and that only the President and Chief Operating Officer could so obligate the Company. (JX-3, JX 2). The Smith Grievance and the Class Grievance continued on separate tracks but in a relatively close time frame. The Smith grievance proceeded to Step 3 before C2G’s President, Tom Copeland. Copeland did not know Mr. Smith, and in preparing for the Step 3 meeting made it a point to check his personnel file. (JX-5, Tr. 422:10-13). At that time he discovered Smith had been hired as a part-time employee according to his offer letter, and that Huggins (who did not have access to the offer letters or personnel records of Union employees (JX-5 Tr. 406:17-22; JX-2, Tr. 384:6-16; Bd. Tr. 56:5-57:13)) had been operating under an erroneous assumption regarding Smith’s status. (JX-5, Tr. 422:14-22). Copeland recognized that because

⁶ Copeland provided a detailed account of his involvement in the events relating to the Smith grievance and the 15-119 vacation pay grievance both in the Ahearn Arbitration and the Snider Arbitration. Rather than repeat that testimony verbatim here, C2G refers to the testimony that can be found at JX-2, Tr. 379:21-382:15, and JX-5, Tr. 421:1- 424:2.

Smith had been hired as a part-time employee, he therefore should have accrued vacation under Section 18.01 of the contract from Day 1, rather than just after the first year. In his words, he found himself in a “catch 22.” His position was inconsistent with the personnel records and offer letter because the records showed he was a part-time employee and C2G had been relying on provisions of the contract applicable to someone who was not a part-time employee (Section 18.02). (JX-2, Tr. 382:3-382:10). He thought Smith should have been accruing vacation as a part-time employee under Section 18.01 and not under Section 18.02. Copeland concluded C2G could not continue the position taken in the grievance process if he was going to live up to the contract as he interpreted it. (JX-5, Tr. 423:17-23). In an effort to comply with the contract, Copeland accordingly had Huggins recalculate Smith’s vacation pay per Section 18.01 of the contract, based on hours worked from date of hire, and paid him whatever he should have been so paid, less amounts already paid to him. According to Copeland’s testimony, Smith was paid in accordance with Section 18.01 of the contract per his office’s calculations. (JX-5, Tr. 424:7-8). Union Agent Holan agreed that it was “very possible” Mr. Copeland believed he was paying Smith as if he were a part-time employee. (JX-5, Tr. 97:22-98:1).

As a result of the Smith grievance, Copeland realized that his bookkeeper had been calculating vacation under Section 18.02 for all employees, including (erroneously) those individuals hired after October 2012 as part-time employees into an open part-time position. It is uncontradicted that Ms. Huggins was not involved in the hiring process and did not have access to the personnel files. Nor was she aware the employees were part-time until Copeland informed her. (JX-5, Tr. 425:8-22). Consequently, she had been erroneously assuming their vacation should be calculated in accordance with Section 18.02. Thus, there were two errors by Huggins: First, Huggins had not been accruing vacation for the new hires per Section 18.01 of the CBA.

Second, she had mistakenly treated the new hires as if they had worked a year already for purposes of Section 18.02. (JX-5, Tr. 434:11-435:9).

After discovering this error, and in order to ensure consistent treatment, Copeland made the same correction for anyone else hired after the initial assumption of the contract whose offer letter indicated the person was a part-time employee, and recalculated their vacation under Section 18.01. (JX-5, Tr. 423:21-424:6, 434:11-17). Mr. Copeland also did this to ensure that the part-time employees could begin taking vacation they had earned since date of hire, rather than not accruing any vacation in their first year of employment in the new position. (JX-5, Tr. 445:7-21). This correction was not extended to persons who were offered and accepted a position in September 2012 who were still holding those positions. This was because of the agreement made at the time of the initial contract that the individuals in those positions would be grandfathered and treated as full-time. (JX-5, Tr. 426:12-18). And, because their seniority date was credited as being from the initial date of hire at the facility (dating back years), the first year-no accrual rule did not apply. Jt. Ex. 1 at §6.01, (Bd. Tr. 9:7-9:24; Bd. Tr. 70:6-70:20).

The employees who were offered and accepted employment in a part-time position were Phillip Finney, Richard Tulietufuga, Glenda Evans, Allan Matthews, and Chris Jones (now a supervisor). Mr. Finney and Mr. Tulietufuga were subject to the re-calculation because they had subsequently bid into and accepted a new position in a part-time position. (JX-5, Tr. 436:8-438:2; 443:25-444:3). However, because they were hired in September 2012, their seniority date was credited as being from the initial date of hire at the facility (dating back years), and the first year-no accrual rule did not apply. (JX-6, Jt. Ex. 1 at §6.01; JX-5, Tr. 426:3-18; 427:6-25).

At the hearing, GC made a significant issue about pay stubs provided to these individuals in late August or September of 2015 and indicating they reflected zero accrual of vacation. In

fact, as Copeland noted, this zero accrual was due to a software glitch of some sort (Bd. Tr. 115:6-23), because even in those cases where a zero was recorded for the particular pay period, the amount of vacation balance that was recorded as accumulated actually increased from pay period to pay period by the correct contractual amount. (*Id.*)⁷ Thus, employees were not being denied vacation pay.⁸

On September 28, 2015, the Union filed Grievance 15-128. This grievance claimed the Employer violated the contract by hiring persons as part-time employees, by changing the accrual rate from 18.02 to 18.01 for post-2012 hires, and by directly dealing with the post-2012 employees through the offer letters. Jt. Ex. 2

Next, on or about October 6, 2015, the Union demanded arbitration of Grievance 15-119 and, at the same time, sought to modify grievance 15-119 to include not only the issue about whether vacation accrues during the first year of employment under Section 18.02, but also to attempt to include a challenge to the Company's position that the five individuals were hired as part-time employees and accrued vacation under Section 18.01 of the contract. (Union Ex. L). These two grievances proceeded to arbitration, each before a separate arbitrator. The Union also filed a Board charge in November 2015, and then an amended Board charge in 2016. The Region issued a complaint, but elected to continue the hearing indefinitely pending the results of the two arbitrations. (GC-1, Order dated September 9, 2016).

There was a two and one-half day hearing before Arbitrator Ahearn on Grievance 15-119, and a two day hearing before Arbitrator Snider on Grievance 15-128. Arbitrator Ahearn issued

⁷ It also is possible that this was a result of the zeroing out process Copeland testified that Huggins followed to calculate vacation. (JX-5, Tr. 434:11-435:9).

⁸ It should be noted in this regard that pay stubs are not some legally binding agreement. Copeland noted that corrections to pay are not uncommon. (Br. Tr. 54:24-55:14).

two principal rulings as to Grievance 15-119 -- both tied to the question of how the employees in question should have earned vacation under the CBA: First, Ahearn concluded that the employees in question were not “part-time seasonal employees” for purposes and within the meaning of Section 18.01 of the CBA and therefore did not earn vacation from date of hire or at the 18.01 rate. Because the employees were not “part-time seasonal employees” within the meaning of Section 18.01 of the CBA, then Section 18.02 of the contract applied. (JX-4). He did not decide whether C2G could hire part-time employees. Second, Arbitrator Ahearn agreed with the Employer that, under Section 18.02 of the CBA, the employees do not earn and accrue vacation during the first year of the contract. (JX-4, at 22-23).

Arbitrator Snider issued a separate ruling on different issues as to Grievance 15-128. He found that the Employer did not violate the contract by hiring part-time employees, or by sending offer letters, and denied Grievance 15-128. (JX-7).⁹

IV. ARGUMENT

- A. THE ALJ ERRED IN FINDING THAT THE EMPLOYER HAD TO BARGAIN WITH THE UNION BEFORE IT CONFORMED THE PAY STATEMENTS OF A FEW NEW HIRES TO THE CLEAR AND UNAMBIGUOUS CONTRACT LANGUAGE STATING THAT VACATION DID NOT ACCRUE IN THE FIRST YEAR OF EMPLOYMENT BECAUSE OF AN ALLEGED LONGSTANDING 3-YEAR PRACTICE OF ACCRUING VACATION FROM DATE OF HIRE SIMPLY BECAUSE THE PAY STATEMENTS OF EMPLOYEES NEWLY HIRED AFTER APRIL 2014 INACCURATELY REFLECTED VACATION ACCRUALS FROM DATE OF HIRE FOR THE TIME PERIOD BETWEEN THEIR HIRE DATE AND WHEN THE MISTAKE WAS DISCOVERED.**

⁹ After the Ahearn Award was issued, all the employees in question have, in accord with the Ahearn Award, accrued vacation at the 18.02 rate. And, as stipulated by the parties, they all had their vacation for periods prior to the Ahearn Award recalculated and corrected as if they were accruing vacation in accordance with Section 18.02 of the CBA, at the 18.02 rate. (Bd. Tr. 783:20; JX-1, Stipulated Facts). As a consequence, because of when they were first hired, only two current bargaining unit employees, Evans and Matthews, would, under the ALJ’s ruling, be owed additional vacation attributable to the first year of employment.

The ALJ's ruling that C2G's correction of newly hired employees' pay statements without bargaining with the Union constituted an unlawful unilateral change is reached through a set of tortured logic and assumptions having no basis in law or fact. The end result is a recommendation that the Board find an employer violated the Act by correcting ministerial mistakes made by a payroll clerk without management's knowledge or approval, even though the corrections were made to comply with the CBA. (Br. Tr. 54:1-20; 56:5-58:2; 165:13-106:16; JX-5, Tr. 416:17-22, 434:23-435:6, 424:8-22, 421:1-424:2). This recommendation is not only illogical, but as described in detail below it is not supported by the law or the facts for multiple reasons.

1. The CBA Was Clear And Unambiguous. Board authority is quite clear that past practice should not be considered where the contract is clear and unambiguous. There is no reason to consult "past practice." *LIR-USA Mfg. Co. Inc.*, 306 NLRB 298, 306 (1992) ("Where the contract is clear, it is unnecessary to consult the bargaining history or past practice at the plant"); *Hotel Roanoke*, 293 NLRB 182, 196 (1989) ("Labor contracts are normally interpreted in accordance with their unambiguous language and the matter of past practice becomes relevant only in the event of ambiguity"). The CBA here was clear and unambiguous regarding accrual contrary to what the ALJ found. This is apparent from an examination of the plain language of the contract.

Section 18.01 specifies that the vacation for part-time employees commences to accrue on "date of hire." No such language is contained in the part of Section 18.02 dealing with accrual of vacation for employees who are not part-time seasonal employees. In stark contrast, Section 18.02 specifies that vacation accrues "after one year." If the parties intended for vacation to accrue on date of hire under Section 18.02, then they would have specified that

vacation accrues on “date of hire,” as they did under Section 18.01. The different language in Section 18.02 therefore clearly allows for vacation to accrue only after the first year of employment. This interpretation is further supported by the language in Article 18 that provides: “Earned vacation hours as used in this Article shall vest as they accrue.” Clearly, both Section 18.01 and Section 18.02 set the starting date for when vacation accrues. However, while Section 18.01 specifically states the date of accrual to commence on the date of hire, Section 18.02 states that vacation accrues “after one year.” If vacation only accrued on date of hire, then there would be no need to use different language in Section 18.01 than what was contained in Section 18.02. The language in Section 18.01 dealing with the vacation accrual rate for part-time seasonal employees and when accrual commences was added to the CBA when the part-time seasonal provisions were added to the CBA, while the language in Section 18.02 was a carry-over from the prior contract with CAV. The different language on accrual specified in 18.01 would not have been necessary if Section 18.02 did not provide that vacation does not accrue until after one year. Far from being ambiguous, the language in Section 18.01 (which the ALJ did not quote from in her opinion), makes it abundantly clear what Section 18.02 means with respect to when vacation starts to accrue. Clearly, the CBA contemplates that vacation begins to accrue at different times, and accrues at different rates and according to a different formula, for part-time employees than for full-time employees. Clearly, “after one year” means something different than “day of hire.” It means exactly what it says—vacation does not begin to accrue until after a year. To read the contract otherwise would be to read the language “after one year” out of the contract.

2. There Was No Long-Standing Past Practice Of Three Years (Exceptions 7-10).

The linchpin underlying the ALJ’s entire finding of a unilateral change violation is her

conclusion that there was a long-standing three year past practice of crediting vacation during the first year of employment. Decision, p. 8, lines 29-33; p. 10, lines 23-25, pp. 9-10, lines 33-1. The Order contains multiple references to a long standing practice of three years. *Id.* Yet, there is absolutely no support for this in the record. (Exceptions 7-10). This undermines the entire basis for the decision regarding the claimed unilateral change.

For the ALJ's conclusion to be correct, the evidence would have had to show that from October 2012 (when the CBA was signed) until September 2015, C2G engaged in this practice. This, in reality, was an impossibility on the record before the ALJ.

The evidence is undisputed and uncontroverted that every bargaining unit employee hired by C2G in 2012 had previously been employed by the prior contractor. The evidence is undisputed in both arbitrations and this hearing that, per an agreement with the Union in collective bargaining in 2012, these employees were treated as a full-time employees with service dating back to the date they first started working at Eielson Air Force base under the government contract. (JX-7, p. 7; Bd. Tr. 70:6-20). The Union never controverted this agreement. Therefore, all employees hired in September and October 2012 were treated as having more than a year of service at the time of hire. Therefore, they satisfied the provision under Section 18.02 that vacation accrual only commences after a year of employment. Therefore, they were full-time employees and could not be treated as part-time seasonal employees for purposes of Section 18.01 of the CBA. Therefore, no practice could exist as to new hires, or part-time seasonal employees, until there actually was a new hire.

As a result, no alleged practice could have commenced prior to April 16, 2014, which is when C2G hired its first new employee, Michael Smith. After Smith was hired, no one else was hired until Allen Matthews (November 10, 2014), Glenda Evans (December 1, 2014), and Chris

Jones (May 1, 2015).¹⁰ Smith and these three individuals were the only ones whose payroll statements mistakenly showed them accruing vacation from date of hire. This mistake was discovered in July 2015. JX-3, Co. Ex. 11, pp. 1 and 3. Therefore, the alleged “practice” was 15 months for Smith, 8 months for Matthews, 7 months for Evans, and 2 months for Jones. It was not three years. It was not longstanding. It was not even a practice. It also should be noted that the alleged accrual practice is not one that was regularly occurring for all employees as suggested. This only would apply to someone hired after 2012 during the first year of their employment.

Further, there cannot be an actual practice because no benefits were actually conferred and provided to any of these individuals. None of these new hires actually took vacation before the vacation accrual dispute arose in July 2015. To the contrary, Evans was specifically informed she could not take vacation during the first year of her employment. (JX-6, Tr. 306:16-308:6, 253:20-25; JX-7, p. 12). Likewise, Jones was denied vacation. JX-3, Co. Ex. 11, pp. 1 and 3. None of the other new hires had taken vacation and therefore none of the employees in question actually received a benefit. This is unlike other cases cited where employees had actually **received** a benefit in the past (e.g., exercising seniority rights, not having to report to

¹⁰ Although Richard Tuiletufuga and Phillip Finney bid into part-time positions in May 2014 and August 2015, respectively, they had service credit dating back to their original date of hire with a prior contractor under C2G’s agreement with the Union, they had already worked for C2G for more than one year for purposes of Section 18.02, and therefore had no accrual issue. Bd. Tr. 72:6-21). Any adjustment to their vacation in 2015 was not because they had been employed less than one year, but was based on the fact they had bid out of their positions as full-time employees in 2014 and 2015 respectively into positions that were classified as part-time and therefore C2G believed they bid into a part-time seasonal position which accrued vacation under Section 18.01. Arbitrator Snider found these two employees were properly hired into part-time positions. (JX-7, pp. 2, 10-12, 17-19).

work before jury duty, etc.). The opportunity to use vacation did not present itself until July 2015, except as to Evans (where it was denied).

Thus, the mistake in issue only applied to four people during a period of less than 15 months (and nine months or less for the others) before it was discovered and corrected in July 2015. Consequently, there was not a three year practice of accruing vacation during the first year of employment. Consequently, there was not a long-standing practice at all.

GC did not prove the requisite knowledge needed for a binding “past practice” independent of the CBA. It may be one thing to create a non-contractual right if the CBA is silent -- but here the CBA directly, and unambiguously, speaks to the topic. And, Arbitrator Ahearn has flatly spoken to Section 18.02’s meaning. (JX-7, pp. 22-23) Yet, the ALJ’s decision essentially rewrites the CBA, as confirmed by Arbitrator Ahearn, to state that employees covered by 18.02 do in fact accrue vacation during the first year of employment. This position is not supported by the law or the relevant facts.

Simply put -- under the facts of this case – the time period is not long enough. If an employee is covered by Section 18.02 and they do not begin receiving vacation accrual until they have been there a year, they are receiving exactly what the Union negotiated for them (JX-4, p. 22-23). The same applies where the payroll clerk did not have access to the offer letters showing the new hires were part-time employees and should have accrued vacation in the first year per 18.01.

3. There Was No Past Practice. A “past practice” normally requires an extensive period of time. *Granite City Steele Co.*, 167 NLRB 310, 315 (1967) (past practice when employer allowed conduct to exist for 15 years); *Chemical Workers*, 228 NLRB 1101 (1977) (10

years); *Communications Workers*, 280 NLRB 78, 82 (1986) (32 years). *USC University Hospital*, 358 NLRB 1205, 1210 (2012) (6 years). The factual situation here is inapposite.

A mistake on the pay statements of four employees for a limited period of time, contrary to the express language of the CBA, does not a past practice create. Here the first non-grandfathered employee was not hired until April 14, 2014. (Bd. Tr. 66:19-24). The mistake continued for 15 months for Smith, 8 months for Matthews, 7 months for Evans, and 2 months for Jones, all without management's knowledge. The circumstances do not give rise to a past practice for such a limited time period where none of the affected employees actually received and took vacation.

A past practice cannot exist where, as here, the alleged practice of accruing vacation during the first year of employment was contrary to the plain and unambiguous language of the CBA. As to the meaning of Section 18.02, that language (as Arbitrator Ahearn held) is clear and unambiguous. There is no reason to consult "past practice." *LIR-USA Mfg. Co. Inc.*, 306 NLRB 298, 306 (1992) ("Where the contract is clear, it is unnecessary to consult the bargaining history or past practice at the plant"); *Hotel Roanoke*, 293 NLRB 182, 196 (1989) ("Labor contracts are normally interpreted in accordance with their unambiguous language and the matter of past practice becomes relevant only in the event of ambiguity"). And, it would take proof of open, knowing and intentional disregard of that language to follow a contrary practice to negate that language. Indeed, the Union would not assert a practice existed if the shoe was on the other foot.

The ALJ's heavy reliance on *Healthcare Services-Garden Grove*, 357 NLRB 653 (2011) is inapposite and misplaced for multiple reasons. Unlike this case, *Garden-Grove* involved a benefit that was not addressed in the contract at all. It was an extra contractual benefit not specifically provided for in the contract. This was the same for other cases cited by the ALJ.

In contrast, here vacation accrual was specifically addressed in the CBA. Cases involving practices amounting to extra-contractual benefits, like *Garden-Grove*, have no application here. In *Garden-Grove*, the CBA was silent as to the benefit at issue (a reserve sick leave plan). *Id.* 656. In that case, there was no arbitration award supporting the employer's interpretation of the accrual language in the CBA. Here, the issue does not involve changing a benefit not provided for in the CBA. Rather, it concerns interpreting and applying a benefit (vacation) specifically provided for in the CBA for part-time seasonal employees and for all employees who were not part-time seasonal employees. It concerns a question of contract interpretation and not rescission of a long-standing benefit.

Unlike this case, *Garden-Grove* involved a situation where a successor employer continued a long-standing practice that had been in effect during the tenure of the predecessor employer. Here, the parties had just negotiated changes to the CBA that added terms and provisions more favorable to the employer. Specifically, the changes allowed for the Employer's right to have part-time seasonal employees work during the "exercise" season for less than 32 hours per week, it provided a different method and formula for calculating vacation accrual for part-time seasonal employees, and it provided a different method of calculating vacation accrual than had been provided for in 18.02 of the contract. (JX-4, p. 22). Significantly, the changes to the language in the CBA added further clarification as to when accrual commences under Section 18.02, by specifying that accrual for part-time seasonal employees commences on the date of hire. This was different than the language "after one year" in Section 18.02. There would be no need to use different language for part-time seasonal employees unless "after one year" meant what it said; which is how the Arbitrator and the Employer interpreted it. (JX-7 pp. 22-23). At

the same time, the Employer agreed to grant service credit to the employees who had worked for the prior government contractor from the date of original hire.

Therefore, the parties in this case had entered into a different contract with different meanings, unlike in *Garden-Grove*, where the employer mistakenly continued to pay a benefit that had been accorded by the prior employer without specifying any change when it had highlighted other changes in benefits. Unlike *Garden-Grove*, the Employer was not altering a practice that had been in place under the aegis of a predecessor contractor. No past practice was mistakenly continued and no evidence even was presented or cited as to what the past practice on vacation accrual may have been under a prior contract with a predecessor employer even though the labor agreement with a predecessor employer had the same language regarding accrual as in Section 18.02.¹¹ This was the case even though multiple employees who had worked at the base for many years had been called to testify in the arbitrations, and none of them testified as to whether they earned vacation during the first year of employment. Nor did GC present any such testimony at the hearing. In this case, given a new CBA with a different employer and new language, no reasonable employees could be misled as to what the language in question means.

In this case, the Employer had a different interpretation of when vacation accrued, and who was a part-time seasonal employee for vacation purposes, than the Union. That is the grist for the grievance and arbitration mill. In this case, the Employer believed that persons hired after 2012 as part-time employees qualified as part-time seasonal employees, and applied the CBA accordingly when management learned of the error – an application it should be noted that worked to the employees' favor in the case of the immediate dispute between the parties (i.e., if

¹¹ Even if that had been the case, which it was not, the changes made to the CBA in 2012 with respect to when vacation accrual for part-time seasonal employees commenced further clarified that vacation accrual for employees under Section 18.02 did not commence until after one year.

the employee was not covered by Section 18.01 then vacation accrual would not commence on day one, and, in the case of Smith, he would not receive any vacation for his first year of employment. Instead, he received essentially the same result as he had demanded, albeit using a different analysis). Therefore, *Garden-Grove* and similar cases have no application here.¹²

Section 18.02 is clear and unambiguous on its face. And, there are two arbitration awards confirming the CBA states exactly what C2G agreed it means. (JX-4, JX-7) Here, the employer had no knowledge of the practice as the error was committed by an individual who GC did not allege was a supervisor or an agent. GC-1, Amended Complaint; the more relevant precedents are *Regency Heritage Nursing & Rehab Ctr.*, 353 NLRB 1027 (2009) and *BSAF Wyandotte Corp.*, 278 NLRB 173 (186).

4. There Was No Actual “Practice.” For a practice to exist, some benefit had to be received and taken. However, none of the employees in question actually took vacation attributable to their first year of employment. (JX-3, Co. Ex. 11, pp. 1 and 3, JX-7, p. 13, last paragraph). All that happened was that the employees in question received payroll statements mistakenly showing vacation balances from date of hire. A mere payroll statement is not a contract of employment, or any type of admission as to what someone is owed. Copeland testified without contradiction that it is not uncommon to correct errors in payroll on a regular basis attributable to matters such as the recording of time. Even the Union agreed that when a

¹² For similar reasons, the ALJ’s reliance on *Pekar v. Brewery Workers Local 181*, 311 F.2d 628 (6th Cir. 1962), *cert. denied* 373 U.S. 912 (1963) and *Merrill & Ring, Inc.*, 262 NLRB 392 (1982) and the reasoning therein is misplaced. *Merrill & Ring* involved a long-standing practice not specifically covered by the contract. In fact, GC in that case argued that the employer’s change in jury duty reporting constituted a modification of contract language. *Pekar* involved a situation where the parties had engaged in a mutual practice for an extended number of years in the treatment of the seniority provisions of a labor agreement. Employees actually exercised seniority rights in accordance with that practice, whereas here no one actually ever received a benefit, and there was no long-standing practice. Exceptions 7-10.

mistake in payroll was made in the employer's favor it should be corrected, and that likewise when a mistake in payroll was made in the employee's favor it should be corrected. (JX-5, Tr. 145:8-21).

What did not occur is any instance where the Employer knowingly took an action inconsistent with its rights under the CBA to its detriment. When Evans sought to take vacation, her request was denied. (JX-7, p. 12, last paragraph). When Jones sought to take vacation in July 2015 (approximately two months after he started work) his request was denied. JX-3, Co. Ex. 11, pp. 1 and 3). When Smith was paid out his accrued vacation he was not paid out for the first year of employment.¹³ Thus, this is not like a situation where an employee has been overpaid for months, or taken unearned vacation. Rather, no situation occurred where the Employer knowingly undertook to pay someone vacation they had not earned contrary to the language of the CBA. Here, the Employer did not knowingly create a precedent. Ms. Huggins only became aware of the error herself in July 2015 when Jones sought to take vacation after two months of employment. JX-3, Co. Ex. 11, pp. 1 and 3.

For a past practice to exist, the employer must be aware of it. *In Re Regency Heritage Nursing & Rehab Ctr.*, 353 NLRB 1027, 1028 (2009) citing *BSAF Wyandotte Corp.*, 278 NLRB

¹³ The ALJ confused/conflated the mistake regarding accrual of vacation in year one under Section 18.02, and the mistake in interpreting whether vacation should accrue from day one if Section 18.01 applied at the 18.01 rate. This error is understandable for someone reviewing this case on a cold record with limited live testimony. The first mistake, accruing vacation in the first year of employment, is the one at issue. The second mistake relates to Copeland first discovering that the new hires were not being treated for vacation accrual purposes as part-time seasonal employees who should have accrued vacation from day one at the 18.01 rates rather than, after one year of employment, at the rates applicable to full-time employees and others not considered part-time seasonal employees under Section 18.02. In this regard, the ALJ incorrectly found that Copeland learned of the error regarding accrual under 18.01 in July 2015. The uncontroverted testimony is that Copeland did not discover that mistake until he reviewed Grievant Michael Smith's personnel records in advance of the grievance meeting in September 2015. Exceptions 17.

173, 180 (1986). It is difficult to see how the continuation of a mistake in recording additions to vacation balances for a limited period of time in a small business during the first CBA between the parties, which contradicts plain language of the contract, constitutes a binding past practice. Likewise, it is difficult to see how a payroll clerk who had no access to offer letters showing part-time status could have created a practice as to a limited number of employees who should have been treated as part-time seasonal for purposes of 18.01 vacation accrual (as Copeland believed).

Copeland, the owner of C2G, had no idea this was going on. This was the result of several innocent errors by Ms. Huggins and the fact she had not seen the offer letters. Copeland then quickly acted to correct those mistakes. Indeed, Arbitrator Snider found this is exactly what happened. (JX-7, p. 8, Item F).

Huggins is a bookkeeper with a limited education, not a CPA. Exception 10 and citation therein. C2G is a small company, not Boeing. They should not be judged by such standards. While Huggins may have made some mistakes, they were innocent mistakes and there is no evidence she or Copeland acted intentionally here. Exception 1 and citation therein.

There would need to be an open and notorious practice of knowingly disregarding a the contract language for an extended period of time for even considering disregarding the plain language of the CBA. It certainly would take even more when, as here, this was the first contract between the parties. Likewise, the employees in question characterized as part-time are in fact being treated in accordance with what their offer letter explicitly stated and what an unbiased Arbitrator found they were hired as. (JX-7, pp. 2, 17-20). Employees often prevail in Section 8(a)(5) cases by pointing out that they acted pursuant to a good faith read of the CBA that had a “sound arguable basis.” *Bath Iron Works Corp.*, 345 NLRB 499, 501-02 (2005). Here, C2G’s

read had more than a “sound arguable basis.” Arbitrator Ahearn agreed with C2G’s read of Section 18.02 (JX-4, p. 22) and Arbitrator Snider agreed that (a) the employees in question were part-timers and (b) the CBA authorized C2G’s characterization of them as such. JX-7, pp. 17-20, Exceptions 19-21.

Of particular importance is the fact that this was the first contract between C2G and the Union. There did not exist a situation where an alleged practice had occurred over a period of more than one contract. The parties had just negotiated this CBA. There cannot be a long-standing practice at this stage in the bargaining relationship. There cannot be a long-standing practice contrary to the express language of the collective bargaining agreement.

A mistake does not create a past practice -- particularly, and most significantly, in a case where the alleged practice is directly contrary to express contract language. There was no knowing and intentional decision to act in a manner contrary to express contract language.

5. Huggins Processing Of Payroll Without Knowledge Of A Mistake Is Not Sufficient In And Of Itself To Create A Binding Past Practice. The ALJ’s decision to rely on a mistake by a payroll processor to create a binding practice finds no support in the evidence. GC did not allege Huggins is either an agent or supervisor of C2G -- so it is impossible to see how her actions can be attributable or binding upon C2G as creating a past practice. *cf. Abby Island Park Manor*, 267 NLRB 163, 170 (1983) (refusing to find liability under Act for actions of person not found to be an agent or supervisor). Huggins’ role in all of this is amply featured in the arbitration transcripts. Given that both arbitrations were held in 2016, and the Amended Complaint issued in March 2018, if the Region believed she were an agent or supervisor, they

had ample time to make that allegation.¹⁴ Indeed, even if there had been no arbitrations – GC’s failure to prove that C2G was aware of this “practice” would be fatal to the charge. *BSAF Wyandotte Corp.*, *supra*. In fact, CG did not present evidence sufficient to support the LAJ’s findings in this regard.

C2G’s President testified that no one at C2G other than himself had authority to set terms and conditions of employment. (JX-2, Tr. 396:21-398:3). Huggins is not a CFO. She is not an accountant. She is a bookkeeper with a high school degree who merely gave herself a lofty-sounding title even though she merely processed payroll. It was the Station Managers who approved time records. All Huggins did was process the payroll in accordance with the software program.¹⁵ This is merely a clerical task. Further, and significantly, none of the employee witnesses who testified indicated they relied on or assumed that whatever Ms. Huggins did or said constituted the actions of the employer. All they testified was that they saw changes in the pay statements issued to them. That is not attributable to the actions of Huggins. The ALJ’s conclusion that employees did so rely has no support in the evidence.

6. The ALJ Erred When, Relying On The Very Same Evidence Presented To The Arbitrator, She Applied Her Own Interpretation Of the CBA, Instead Of Deferring To The Arbitrator’s Interpretation Of The CBA, And Then Mandated That Her Interpretation Governed On A Going-Forward Basis When That Interpretation Is Incorrect.

The ALJ in this case heard evidence for less than a half day from the testimony of C2G’s President. The balance of the record consisted of the exhibits and testimony presented in each of the two arbitrations. When it came to a question of contract interpretation, she essentially

¹⁴ Huggins in turn does not supervise anyone and would have no reason to know she was doing anything wrong.

¹⁵ Again, the purpose of the Act is to promote CBAs, negotiated by unions and employees. *Consolidated Edison*, 305 U.S. at 236. It makes no sense to elevate the innocent errors of a payroll manager over what the parties actually negotiated.

listened to the same evidence as the Arbitrators. This included testimony and evidence from the Union as to how vacation had been calculated as to multiple employees during their C2G employment, and regarding the practices of prior employers.

The Employer and the Union agreed to hire a private arbitrator to resolve their contractual disputes and determine what the CBA meant in this factual situation per their CBA. GC in fact elected to essentially defer as well in practice because GC postponed the hearing on the Board charges indefinitely pending the conclusion of the arbitrations. Under these circumstances, the Board should exercise its discretion to defer to the Arbitrators' interpretation of the CBA, and not, as the ALJ did, engage in her own re-interpretation of the CBA to suit her purposes. No authority is cited for the proposition that a "past practice" which is not clear, open, and unequivocal should supersede express language in the CBA. But the ALJ recommends the Board should impose its own interpretation of what the CBA means on a going forward basis after an Arbitrator already decided what the CBA says. And, to top things off, the ALJ recommends that, as to individuals hired after her order, Respondent must accrue vacation during the first year of employment even though the CBA specifically provides otherwise and even though no new hire would have any reason to rely on an alleged past practice.

In fact, Arbitrator Ahearn's decision conclusively determined what the contract means. The parties had a dispute over what the CBA means. That is part of the bargaining process. They submitted that dispute to an Arbitrator. He interpreted the contract. That is what the parties bargained for. The Employer did not make a unilateral change, it sought to resolve the disputes pursuant to the grievance arbitration procedure. The Union raised the issue of vacation accrual as a class grievance and pursued it to arbitration after the Smith grievance settled. The Employer acknowledged to the Union an error in calculating vacation accrual during the

grievance procedure and when the parties could not agree the matter proceeded to arbitration – which is part of the agreed process for resolving disputes. The ALJ’s decision in effect takes away from the parties what they bargained for.

The ALJ seeks to avoid this result by claiming that Arbitrator Ahearn eschewed past practice in interpreting the CBA and reaching his decision. That is far from the case. The arbitration transcript (JX-2) shows the Union presented extensive evidence concerning how each union employee who worked for C2G was treated in terms of vacation accrual as well as what the practices had been under prior contracts with prior employers. Nevertheless the Arbitrator interpreted the CBA as not providing for accrual of vacation during the first year of employment. Whatever evidence of practice was presented by the Union was not sufficient to overcome his interpretation of the CBA. Contrary to the ALJ’s ruling, in his analysis the Arbitrator stated that he would agree with the Employer’s interpretation of the accrual issue “unless extrinsic circumstances compel a different result.” (JX-4 at 22). He further ruled that “I am unable on the basis of the record to find evidence sufficiently persuasive to establish a predecessor’s past practice directly contrary to the plain meaning of 18.02” *Id.* at 23. And, in closing the Arbitrator specifically noted that “In my findings and conclusions, I have carefully considered all the evidence,... even if not specifically mentioned in this Opinion.” *Id.* Thus, contrary to the ALJ’s analysis, the Arbitrator was presented with evidence of past practice and did not find a past practice sufficient to control and overcome the plain meaning of the CBA.

If Arbitrator Ahearn had concluded that past practice was sufficiently strong to overcome that language then he clearly would have so ruled. Certainly, it is not “repugnant” to the Act to conclude, as did Arbitrator Ahearn, that the supposed past practice did not alter clear contract language. This is particularly the case when this was the first contract between the parties, the

parties had just negotiated new language into the CBA relating to part-time seasonal employees, and therefore there was insufficient time for a practice to develop. It contravenes federal policy in Section 301 favoring arbitration to enter an order that disregards, and rejects, an Arbitrator's interpretation of the CBA, and denies the employer the benefit of a contractual provision expressly agreed to by the parties.

C2G recognizes that the Board "is not precluded from adjudicating unfair labor practices charges even though they might have been the subject of an arbitration proceeding and award." *Carey v. Westinghouse Electric Corp.*, 375 U.S. 261, 271 (1964). "However, it is equally well established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over the alleged unfair labor practice if to do so will serve the fundamental aims of the Act." *Id.*, quoting *International Harvester Co.*, 138 NLRB 923, 925-26 (1962); *CertainTeed Corp.*, 2013 WL 772784 (February 28, 2013) quoting *Wonder Bread*, 343 NLRB 55 (2004)(same). C2G submits that deferring to Snider and Ahearn awards will promote the purposes of the Act. "The underlying objective of the national labor laws is to promote collective bargaining and to help give substance to such agreements through the arbitration process." *Carey*, 375 U.S. at 265. That is exactly what the Snider/Ahearn awards do -- they give "substance" to the parties CBA. *International Harvester Co.*, 138 NLRB at 925-926 ("The Act ... is primarily designed to promote industrial peace and stability... Experience has demonstrated that collective bargaining agreements that provide for final and binding arbitration of grievances...contribute significantly to the attainment of this statutory objective"). It serves the purposes of the Act, to accept the Arbitrators rulings and dismiss the Section 8(a)(1) and (5) allegations.

While Arbitrator Ahearn did not specifically rule on whether C2G engaged in an unfair labor practice, that is not the real issue with respect to deferral. The unfair labor practice exists only if an alleged past practice exists that supersedes the express language of the CBA. Regardless of what lip service was given in the Arbitration Award to there being no ruling on the ULP, the fact is that the Arbitrator ruled on the fundamental issue on which the ULP was based. Thus, the Board should defer to the Arbitration Awards. The arbitration proceedings were fair and regular, as is evident from the record of each proceeding. The parties agreed to be bound by the awards. (JX-6, JX-1 thereto, Article 11, p. 13). C2G has followed those Awards. And, the award is not clearly repugnant to the purposes and policies of the Act. *See Olin Corp.*, 268 NLRB 573, 574 (1984) *citing Spielberg Manufacturing Company*, 112 NLRB 1080 (1955).¹⁶ The proceedings were fair and regular. As to consideration of the ULP, as the Board held in *Olin*, at 574:

“[W]e adopt the following standard for deferral to arbitration awards. We should find that an arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice.”

The procedural posture of this case establishes both tests enunciated by *Olin*. This case was largely submitted on a stipulated record. GC did not present a single witness. GC’s entire case is based upon the evidence and documents (i.e. the facts) presented to one or both of the Arbitrators. In this context, the cases are “factually parallel” and the Arbitrators were “generally” presented with the “relevant facts.” After all, GC’s entire case is based on what was

¹⁶ These standards are not impacted by the Board’s decision in *Babcock & Wilcox Const. Co.*, 361 NLRB 1127 (2014). As General Counsel Griffen explained, those standards do not apply to CBAs entered into before December 15, 2014 even if the arbitration occurs after the CBAs expiration date. GC 15-02, pp. 8-10 (February 10, 2015). These arbitrations occurred under a CBA that was entered into October 1, 2012. (JX-6, JX-1 thereto).

presented to Arbitrators Snider and Ahearn. Not only are the awards not “clearly repugnant” to the Act, *Olin*, 268 NLRB at 574, but both Awards are consistent with the CBA. The law cannot be that it is “irrelevant” that: (a) the parties bargain in good faith to reach a CBA, (b) the CBA is clear and unambiguous as to its meaning and (c) an unbiased arbitrator (selected by the parties) reaches the same conclusion. Put another way, deeming all that “irrelevant,” how could that possibly comport with the Supreme Court’s directive that the purpose of the Act is entering into a CBA (*Consolidated Edison*, 305 U.S. at 236), and that “substance” be given to CBAs “through the arbitration process.” *Carey*, 375 U.S. at 265.

7. The Alleged Practice Was Not Material Nor Did The Employer Otherwise Violate The Act (Exception 21). The ALJ rejected the contention that no past practice existed because the vacation accrual in dispute is not material. However, that was the case.

Section 8(a)(5) requires that a change be “material, substantial, and significant.” *Alamo Cement Co.*, 281 NLRB 737, 738 (1986). It is GC’s burden to prove the alleged change met that standard. *North Star Steele Co.*, 347 NLRB 1364, 1367 (2006). In Arbitrator Ahearn’s ruling (JX-4), calling the employees “part-time” did not work a “material, substantial and significant” change. Their schedules are “indistinguishable” from full-time employees. (JX-4, p. 21. They continue to accrue vacation under Section 18.02 just like when they were full-time. (JX-4). And, having them accrue vacation after one year simply gives them what the Union actually negotiated

Employees subject to 18.02 accrue vacation up to a fixed cap. Employees subject to Section 18.01 accrue vacation at a different rate based on hours worked without a cap. And, unlike section 18.02, vacation accrues from day one of hire. Thus, it is entirely possible that an individual could earn more vacation if Section 18.01 applied than if Section 18.02 applied. And,

regardless, the differences in accrual rate are not material. This is not a situation where the employee was receiving no vacation for the first year when Copeland interpreted the contract as requiring him to apply Section 18.01. Even if the employees were entitled to accrue under Section 18.02 in year one of employment, which they are not under the CBA, the difference between accrual at the 18.01 rate Copeland was crediting compared to the 18.02 rate in one year was immaterial in terms of the number of days' difference.

In any event, the ALJ should have agreed with the Union's testimony that mistakes should be corrected to conform to the CBA regardless of in whose favor the mistake exists. (JX-5, Tr. 145: 8-24)/ The ALJ disregarded, and the Board should note, that Union Business Agent Holan testified and agreed that when a mistake in payroll is made in the employer's favor it should be corrected, and that likewise when a mistake in payroll is made in the employee's favor it should be corrected. *Id.* Thus, even the Union agreed that a mistake that is inconsistent with the CBA does not constitute a binding past practice. Rather, the Union agreed the mistake should be corrected to conform to the CBA without bargaining. At best, that is all that occurred here. There should be no obligation to bargain over correcting a mistake to conform to the CBA.

Further, the Board should not overlook the fact that there was bargaining to impasse between the parties over what the CBA said. That bargaining took place in the context of the Smith grievance, the Class Grievance, and the 15-128 grievance. The parties could not reach agreement and then elected to have their disputes resolved by the Arbitrators. The GC allowed this to happen as well rather than proceeding to a hearing. Thus, the parties have bargained to impasse already and the results of that impasse – two separate arbitration decisions – have been implemented. Correcting mistakes to conform to what the contract says, or what the parties believe it means, is not a unilateral change.

B. THE ALJ ERRED IN FINDING THE EMPLOYER’S USE OF THE OFFER LETTERS VIOLATED SECTION 8(A)(1) AND (5). Exceptions 26-31.

Considerable focus in this case was directed to the use and application of the offer letters sent by C2G. However, when viewed in context, the conclusions drawn from the evidence are not supported by the evidence.

The existence (or non-existence) of a Section 8(a)(1) violation is determined under the totality of the circumstances test. *Mediplex of Danbury*, 314 NLRB 470, 472 (1994). Thus, “particular phrases” should not be read in isolation. *Lutheran Heritage Village - Livonia*, 343 NLRB 646 (2004).¹⁷ The assumption should be that employees reading the letters are aware of their legal rights, with the inquiry then being would a reasonable employee believe their rights were being impinged? *T-Mobile USA, Inc. v. NLRB*, 865 F.3d 265, 271 (5th Cir. 2017). Here, there is much speculation in the ALJ Order as to what an employee may have believed or whether they may have felt coerced because of the offer letters. What is woefully lacking is any evidence from the employees themselves that they in fact believed management could change or disregard the CBA at will, or that they were in any way coerced. GC did not call any employee witnesses at the hearing to testify as to what they believed or what they felt. And, C2G believes that no such evidence was presented on this point in either of the hearings. Absent such evidence, support for the ALJ’s findings is not sufficient and the GC did not meet its burden.

The ALJ found that, at least prior to the time on September 21, 2015 when Copeland advised that the part-time employees who were hired after 2012 should be accruing vacation at the 18.01 rate, the offer letters were fine based on the specific language. Decision, p. 16, lines 16-17. To the extent that is not her conclusion, it would be evident that the offer letters under the

¹⁷ While *Lutheran Heritage* was substantially modified in a pro-employer fashion in *Boeing Co.*, 365 NLRB No. 154 (2017), the cited principle was not impacted.

totality of circumstances are lawful.¹⁸ The totality of circumstances includes the fact that, at the time the offer letter is provided, so is a copy of the employee handbook. The individual is asked to sign both the offer letter and a receipt for the employee handbook. The employee guidelines are specifically incorporated into, and must be read as part of, the offer letter. According to the express terms of the offer letter: “Your signature on the enclosed Employee Guidelines will signify your acceptance of this offer.” (*See, e.g.*, JX-3, Union Exs. 26, 31 and 35). Thus, the employee handbook is entered into contemporaneously with the offer letter and the two also must be read in context. This is significant because the employee handbook, in turn, makes clear that a CBA exists and that its terms control. (Bd. Tr. 58:5-59:2) (*See also* JX-2, Union Ex. 35, handbook signature page). Also, the CBA provides that any agreement between C2G and the employee that conflicts with its terms is “null and void.” (JX-6, JX-1 thereto, Section 5.02). Even the Union recognized the offer letter was a form letter and knew the CBA prevailed. Contrary to the ALJ’s finding, the offer letter thus does not, and cannot, reject the language of the CBA, nor indicate that the terms of the offer letter supersede the CBA.

The offer letter specifically references the existence (and controlling weight of the CBA) on two separate occasions (when discussing “Health and Retirement Benefits” on p. 1 and when discussing “economic terms” on p. 2). No reasonable employee is going to read the offer letter and the handbook and assume C2G can do whatever it wishes. A reasonable employee is going to recognize that a contract governs over a letter, particularly a letter which actually states it is not a contract: The offer letter says “neither this letter nor the previous signed Employee

¹⁸ The 2012 offer letters were sent out before C2G took over the government contract, before C2G had hired its full complement of workers, and before C2G entered into a contract with the Union. When the letters were sent to the individuals, they were not yet employees. Under the CBA new hires were subject to dismissal at-will at any time during the 90 day probationary period. Therefore, the employees initially were at-will employees.

Guidelines are intended to create a contract of other guarantee of employment or employment terms.” (See, e.g., JX-3, Union Ex. 31 (emphasis added)). Certainly, a reasonable employee would recognize that the language in Section 5.02 of the CBA, regarding contrary agreements as being “null and void” -- means exactly that. Those words are not obscure Latin phrases only a lawyer would understand. They are common words a reasonable employee would surely understand. Indeed, if a reasonable employee could read the letter as saying C2G could (in effect) do what it wanted, when it wanted -- then the Union would have filed a charge (certainly) in 2014. No self-respecting union is going to let a company use a letter that could even plausibly (much less reasonably) be construed as granting the employer the right to change terms and conditions of employment at any time.

In fact, the offer letter does not, as the ALJ suggests, unqualifiedly gives the Respondent the right to change terms and conditions of employment at-will. The offer letter to the contrary specifically qualifies C2G’s right to make changes. It says :

Except where otherwise stated or required by law, the terms and conditions of your employment will be set by C2G Ltd. Co. Thus, while C2G Co. Ltd. will continue to provide economic terms included in the CBA any initial terms and conditions not otherwise mandated by law or addressed in this letter or enclosed Employee Guidelines will be in accordance with C2G Ltd. Co. standard policies, procedures and/or practices. Of course, the Company reserves the right to the maximum extent permitted by law to alter or amend the terms and conditions of employment and its employment policies and procedures.” (JX-3, Union Ex. 31)(Emphasis added).

Obviously, the law includes 29 U.S.C. Section 185 (i.e. Section 301) and the Act itself. It therefore is clear that the terms of the offer letter were made subject to all applicable laws. No reasonable employee could read the letter and assume that C2G has reserved the right to pay below minimum wage or ignore overtime laws or ignore federal labor laws. No reasonable employee would assume it gives C2G the right to ignore a CBA (which Section 301 requires to be followed) referenced at least twice in the letter. C2G’s reservation of rights is simply a

shorthand way of describing what the CBA's management rights provides. (JX-6, JX-1 thereto, Section 1.03). No reasonable employee would conclude this language gives C2G license to violate the law or their legal rights. No evidence as to how the employees themselves actually interpreted the letter was presented sufficient to prove otherwise.

The letter also references at-will employment. However, the fairest read of the letter is that C2G is making clear that the letter does not alter at-will status during the initial 90 day probationary period. This is important as courts can, and do, find even in the Union environment, that side arrangements can alter at-will status. *Prince v. Appalachian Reg'l. Healthcare, Inc.*, 2015 WL 8486179 (E.D. Kentucky, December 9, 2015). The letter does not say the employee has no "contract or other guarantee of employment or employment terms." It says "neither this letter nor the previous signed Employee Guidelines are intended to create a contract of other guarantee of employment or employment terms." (*See, e.g.*, JX-3, Union Ex. 31 (emphasis added)). Far from trying to contract (deal) directly with the person, C2G affirmatively states it is not.

The ALJ found otherwise even though GC presented no evidence from any C2G employee that he or she thought the offer letter superseded the CBA, that the Employer could change employment terms at any time, or that they were at-will employees. If this had been the case, then certainly the GC would have presented additional evidence on this point.

The offer letter clearly was drafted with the express intention to comply with the CBA and applicable law. It did not chill the exercise of any rights under the Act, nor did it confuse any employees of their status. No Union employee testified otherwise, and yet the ALJ reached that conclusion. The ruling is not consistent with the evidence and lacks support in the record.

C. THE ALJ ERRONEOUSLY CONCLUDED THAT THE SECTION 8(a)(1) AND (5) ALLEGATIONS REGARDING THE OFFER LETTERS WERE TIMELY.

The GC asserted two claims in its amended complaint. The first, asserted as part of the initial complaint, is that the mere existence and wording of the offer letters -- violate Section 8(a)(1) and (5). Amended Complaint, ¶8. The second claim, asserted for the first time in the Amended Complaint, is that the violations occurred when C2G allegedly “misapplied” the offer letters in September 2015 to claim the six employees in question were part-time employees. While this position is mistaken for reasons described below, the claim is deficient for a more substantial reason – it is time barred.

The Board’s charge was filed November 4, 2015 and served November 5, 2015. However, as discussed in detail above, the Union knew about these letters back in 2012, and again was apprised of the same types of letters in May 2014. (JX-5, Tr. 222:18-223:13; JX-7, p. 7). Certainly, the Union knew no later than May 2014 that C2G was using the offer letter in question. (*Id.*; Tr. 128:21-129:9). May 2014 is almost 18 months prior to November 2014, when the earliest charge in this case was filed. (Amended Complaint, ¶1(a)). Thus, the Union had “clear unequivocal” notice of the letters and what they said outside the 10(b) period. *Desks, Inc.*, 295 NLRB 1, 11 (1989). No violation can be found as to any letter issued outside the Section 10(b) period based solely on the fact and content of the letters. In the alternative, this evidence proves the Union expressly and intentionally waived its right to bargain over or object to the content and use of those letters.

Union Business Agent Holan’s testimony on this point is instructive. The evidence is uncontroverted that at the time Richard Tulietufuga, received his offer letter in May 2014, he informed Union Steward Ken Johnson about the part-time language in the letter, and Johnson in turn informed Business Agent Jeremy Holan. Union Steward Kenny Johnson told Holan that

Johnson had received such a letter in 2012 as well. (JX-5, Tr. 222:18-223:13; JX-2, Tr. 252:19-255:11; 257:1-4). According to Holan: “In my line of work, I see letters like this. A lot of the companies that have numerous areas that are union and nonunion, it’s a standard form letter. And with the manager telling him [Richard T] that nothing was going to change, it didn’t raise any red flags for me, because the contract would prevail at that point.” (JX-3, Tr. 254:17-23). Holan noted that “I mean, you see them in the back of employee handbooks, also, that say you’re at-will, but it –it is also signed saying that a - - the CBA prevails. So there would have been no issue, because he was being paid at that time as full-time. (JX-3, Tr. 255:3-7). *See also* (JX-3, Tr. 258:2-10).

Thus there is no question that in 2014, and as early as September 2012, the Union knew the Employer had been sending out offer letters of the type now objected to by the Union and GC as direct dealing and unlawful. Thus, there is no question the Union was aware of all the language regarding at-will, changes in terms of employment, and the like now claimed as a violation of the Act, but not a concern. Nevertheless, the Union did not file a Board charge or a grievance in 2012. The Union did not file a Board charge or a grievance in 2014. No Board charge was filed until more than a year later after the parties could not resolve the grievances over vacation accrual and part-time status and had proceeded to arbitration.

While Finney did receive a letter with the alleged “offending language” inside the 10(b) period, the letter is identical to what the Union saw in 2014. The Section 10(b) runs from when the Charging Party (here the Union) learns of the alleged ULP. Therefore, all allegations concerning the offer letters are time barred.

The ALJ’s ruling appears to side-step this timeliness issue by claiming the offer letters did not on their face violate the Act, but only amounted to a violation when C2G took action in

September 2015 regarding its treatment of the six employees as part-time employees who accrued vacation under Section 18.01. However, this does not solve the timeliness issue. That is because the alleged conduct in question was not part of the Board's original complaint. It was not made a part of the case until the GC amended the complaint in February 2016. And, the amended complaint was not amended and served within six months after the date of the conduct in question. The issue of when vacation begins to accrue under Section 18.02 was triggered by the resignation of Mike Smith. (Bd. Tr. 73:10-14). Smith filed a grievance on August 15, 2015. (JX-4, p. 10). The Section 8(a)(5) issues related to vacation accrual were not raised until the filing of charge 19-CA-169910, which was not filed until February 16, 2016 and not served until February 18, 2016. A charge must be both filed and served within the 10(b) period. (Amended Complaint, ¶1(b)). Both dates are more than 6 months after August 15, 2015. Therefore, any ULP regarding that change is time barred. 29 U.S.C. 160(b).¹⁹

D. THE ALJ ERRED IN CONCLUDING THE EMPLOYER ENGAGED IN DIRECT DEALING. (Exceptions 4, 5, 27-28, 30-31)

GC alleged, and the ALJ found, that the offer letters constitute direct dealing and/or altered the employees terms and conditions of employment. Amended Complaint, ¶¶6(b) and (c). This decision finds no substantial evidence in support in the record.

As explained in detail above, the offer letters are not unlawful. None of the new hires (i.e. those hired in April 2014 and thereafter) was an employee or had even accepted employment at the time the offer letter was sent. Applicants are not employees for purposes of Section 8(a)(5). *Star Tribune*, 295 NLRB 543, 547 (1989). Indeed, an employer's "hiring

¹⁹ The Union may not have learned C2G's position that post-October 2012 employees were part-timers until September 21, 2015. But they knew C2G's position that Section 18.02 meant what it said no later than August 15, 2015 -- outside the 10(b) period.

practices generally fall into the class of business decisions... over which an employer is not obligated to bargain.” *Postal Service*, 308 NLRB 1305, 1308 (1992). So, the Section 8(a)(5) allegation fails as to them.

Additionally, it is extremely difficult to see how the offer letters have “altered” anyone’s terms and conditions of employment. True, the letters reference at-will employment. But, they say they do not create a contract, and they have never been used to treat a non-probationary employee as at-will. (Bd. Tr. 60:9-61:2). Copeland testified that C2G has never taken the position employees may be dismissed or disciplined at will and without just cause in any grievance proceeding. (Bd. Tr. 59:21-61:2). And, C2G acknowledged that, under the CBA, any agreement with an employee contrary to the provisions of the CBA was void. C2G confirmed the same exact position in the employee handbook, which is incorporated into the offer letters.

While the Union viewed Copeland’s announcement that Section 18.02 accruals began after a year to be a change -- Copeland did not rely upon anything in the offer letters. Instead, he relied upon what Section 18.02 actually said, and his position that there had been an unauthorized and innocent mistake. See also JX-4, at 22. In other words, Copeland did not point to the language quoted in ¶¶6(a)(ii) – (iv) of the Amended Complaint to claim he was doing this because there is no contract, and he can set employees terms and conditions of employment and alter them as he decided. Rather, Copeland relied on the CBA’s express language and twice went through the arbitration process mandated by the CBA to confirm his conclusion. He was trying to apply the CBA, and not violate it. He merely interpreted the CBA incorrectly because he believed the individuals in question were part-time seasonal employees within the meaning of the CBA. Except for the part-time language in the offer letters, the letters themselves had

nothing to do with Copeland's actions. Those actions were based on the language of the CBA as he interpreted the CBA based on the factual circumstances.

In fact, Copeland refrained from relying upon the offer letters with respect to the majority of former CAV employees (the ones hired pre-October 2012). The employees hired in October 2012 had letters stating they were part-time, but C2G did not argue that their letters made them part-time or that C2G could change their terms and conditions at any time. Instead, C2G honored the agreement made with the Union -- they would be grandfathered as full-time. (Bd. Tr. 70:6-20).

Changes are supposed to be "material" in order to violate Sections 8(a)(5). Provisions in an offer letter never relied upon by C2G cannot constitute a "change," much less a material change. *North Star Steele Co.*, 347 NLRB 1364, 1367 (2006).

While C2G did utilize the offer letters signed by the post-April 2014 hires with Finney and Tuietufuga, doing so did not "alter" their terms and conditions of employment or constitute direct dealing. To the contrary, Arbitrator Snider found that C2G had a right to enter into agreements with employees so long as they did not conflict with the CBA's terms, and the terms of the CBA gave C2G the right to hire part-time employees or to create part-time positions. *See* fn. 12 above.²⁰ In fact, the offer letters are merely the end result of a bid process spelled out in the CBA. C2G followed the bid process in the CBA and then issued an offer letter to the person who applied. Both Finney and Tuietufuga actually opted to bid into the positions in question –

²⁰ Thus, even assuming arguendo that Huggins' mistake treating employees as full-time who accrued vacation in the first year and Copeland's correcting that error violated the Act, which it did not, Snider's Award conclusively establishes that the offer of part-time status in the first instance was lawful. The CBA gives C2G the right to hire part-time employees or to create part-time positions.

the jobs were not forced on them. They could in fact have elected not to accept the offers and remain in their then current positions.

The CBA was the product of negotiations with the Union. C2G did not bypass the Union by hiring part-time employees or creating part-time positions. C2G simply exercised a right accorded to C2G under the CBA -- a right obtained through negotiations with the Union. Whether analyzed under a “clear and unmistakable waiver” standard or a “contract coverage” standard -- Copeland (i.e. C2G) did all Section 8(a)(5) required with respect to using letters to hire part-time employees or to fill part-time positions. He bargained the right to deal with employees directly so long as the deal did not violate the CBA. The CBA in turn gave him the right to hire part-timers and to create part-time employees. The Union’s conduct and inaction in the face of its awareness of these letters clearly demonstrates a waiver of its rights. This is particularly true where, as here, the CBA contained an express clause indicating all subjects of bargaining were considered prior to signing the CBA. (JX-6, JX-1 thereto, Section 2.01).

E. THE SECTION 8(a)(5) ALLEGATIONS REGARDING VACATION PAY ACCRUAL SHOULD BE DISMISSED, AS SHOULD ANY ALLEGATIONS REGARDING PART-TIME STATUS.

Arbitrator Snider held that under the CBA, C2G had the right to hire part-time employees, and the employees in question were hired as part-timers. (JX-7). Likewise, Arbitrator Ahearn agreed that Section 18.02 employees do not start accruing vacation until they have been employed for a year. (JX-4, p. 22). There was no finding by Ahearn that a past practice existed of accruing under Section 18.02 during the first year of the contract based on the same record and evidence on which GC asks the ALJ to rule.

The ALJ: (1) disregarded the plain and unambiguous language of the CBA as to when vacation accrues under 18.02 for the employees in question and instead effectively rewrote what the CBA says so as to allow these employees to accrue vacation in the first year of their

employment, contrary to Arbitrator Ahearn's interpretation, and (2) found that Arbitrator Snider is wrong – that either C2G can't hire part-timers or, at least, the people he said were part-timers are not. This ruling ignores the purpose of Section 8(a)(5). The purpose of Section 8(a)(5) is to impose upon employers a duty to bargain in good faith. Here C2G fulfilled that duty by bargaining a CBA with the Union. When a dispute arose over the meaning of the CBA, C2G proceeded to arbitration on two separate occasions, and, in the context of this case, obtained favorable rulings. Arbitration is part of the bargained for labor agreement and in and the grievance machinery is part and parcel of the bargaining process. C2G did negotiate with the Union – through the grievance and arbitration process. It has lived with the results of that process, even where C2G did not agree.

The point of Section 8(a)(5) is not to simply bargain. Rather, the point of Section 8(a)(5) is to reach CBAs. *Consolidated Edison v. NLRB*, 305 U.S. 197, 236 (1938) (“The Act contemplates the making of contracts with labor organizations. That is the manifest objective in providing for collective bargaining”). In turn, the courts and arbitrators are the principal sources of contract interpretation. *Litton Financial Printing Division v. NLRB*, 501 U.S. 190, 202-03 (1991). In this instance, the Arbitrators have spoken: the employees in question were properly hired as part-timers (Snider) and Section 18.02 means what it says. These awards reflect the binding ruling as to what the contract means. It would be incongruous not to follow those conclusions.

F. THE ALJ ERRONEOUSLY REQUIRES C2G TO DESTROY LETTERS REQUIRED TO BE MAINTAINED TO COMPLY WITH FEDERAL LAW AND TO DICTATE ACCRUAL RIGHTS FOR VACATION AS TO FUTURE HIRES WHO DID NOT RECEIVE ANY INCORRECT PAY STATEMENTS. (Exceptions 32 and 33)

The ALJ's decision includes two particularly onerous remedies not supported by the evidence. First, the Order requires C2G to destroy all offer letters previously issued to

employees. Exception 32. This includes not just the six employees in question, but anyone else who ever worked for C2G and has since left, and employees hired in 2012 who were grandfathered and never changed positions (unlike Finney and Tuiletufuga). The Order is entered even though the evidence is that, to comply with government regulations regarding security clearances for employees working on the Air Force base, the Employer must use offer letters and will be cited where it cannot present an offer letter. Id. Bd. Tr. 52:8-53:5, JX-5, Tr. 389:5-8, Tr. 384:18-385:11, JX-6, Co. Ex. 5. Thus, the order is directing C2G to violate National Industrial Security Program Operating Manual directive which governs C2G's ability to have a government facility clearance and obtain security clearances for any employees, which could result in citations or revocation of all security clearances for noncompliance with federal regulations and result in loss of the government contract and termination of all employees as an unintended consequence.

Equally troubling is the language in the Order which could be construed as requiring the Employer to accrue vacation for future hires regardless of whether they are hired as part-time seasonal and regardless of what the CBA says. (Exception 33) None of these future hires had received any incorrect payroll statements. None of these future hires relied on any type of alleged practice. It would be inconsistent with the Act to require these hires to receive a benefit the Union could not achieve at the bargaining table. At most, any remedy should be limited to when Huggins rectified her initial error in July 2015. JX-3, Co. Ex. 11, pp. 1 and 3. This would be in accord with Member Hayes recommendation at fn. 4 of the *Garden Grove* decision.

Equally troubling is the language in the Order (p. 19, lines 16-23) which could be interpreted as preventing the Employer in the future, as to new hires, from employing them as

part-time seasonal employees. This is a right specifically negotiated into the CBA. There is no basis for limiting the Employer's right in this regard as to future hires.

V. CONCLUSION

The ALJ's recommended order should not be accepted. It is not supported by substantial evidence. It misinterprets plain contract language. It misreads offer letters saying any rights are subject to applicable legal restrictions. It elects to substitute the ALJ in the stead of the Arbitrators selected to decide the contract disputes. GC elected to postpone litigation of these charges until after the Arbitrators had ruled. Apparently the Region was more than willing to defer to the Arbitrators until it did not like the result. The end result is to effectively throw away thousands of dollars in time and expense for two separate arbitrations for another bite at the apple. They should be denied that bite in the interests of exercising discretion to defer to the arbitration awards. C2G was not trying to disregard the CBA, it was only attempting to comply with the CBA as it interpreted the contract. There was no violation of the Act. For all the foregoing reasons, and the record testimony, the Amended Complaint should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2018, the foregoing Post Hearing Brief Of C2G LTD Co. has been served, as indicated, simultaneously upon the following via U.S. Mail, postage prepaid, electronic mail, and the National Labor Relations Board Online Portal:

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